

**REMARKS**

Applicants submit these Remarks in reply to the non-final Office Action mailed November 13, 2008. Following this Amendment, claims 1-20 remain pending in this application, of which claims 1, 7, and 8 are independent.

In the Office Action, the Examiner took the following actions:

- i. objected to the drawings for "failing to comply with 37 C.F.R. 1.84(p)(5);"
- ii. rejected claims 7 and 11-15 under 35 U.S.C. 101 as being directed to non-statutory subject matter;
- iii. rejected claims 1-8, 11-13, and 16-19 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Publication No. 2002/0032777 ("*Kawata*") in view of U.S. Patent No. 5,951,694 ("*Choquier*");
- iv. rejected claims 9, 14, and 19 under 35 U.S.C. § 103(a) as being unpatentable over *Kawata* and *Choquier* in view of U.S. Patent No. 7,251,691 ("*Boyd*"); and
- v. rejected claims 10, 15, and 20 under 35 U.S.C. 103(a) as being unpatentable over *Kawata* and *Choquier* in view of U.S. Patent No. 6,598,071 ("*Hayashi*").

With this Reply, Applicants have amended independent claims 1, 7, and 8 to include similar recitations, which find support in the Applicants' Specification at least at paragraphs 0039 and 0086. Applicants respectfully submit that the pending claims, as presently amended, are allowable over the art of record for at least the reasons discussed below.

**A. Objections to the Drawings**

The Examiner objected to the drawings for “failing to comply with 37 CFR 1.84(p)(5)” because they do not include reference numbers mentioned in the description. See Office Action at ¶ 3. With this Reply, Applicants have amended the specification by deleting those reference numbers identified by the Examiner and other reference numbers in the same paragraph (0060) that are not included in the drawings. As a result, Applicants’ drawings include all references mentioned in the Specification, and the Examiner’s object is now moot.

**B. Claim Rejections Under 35 U.S.C. § 101**

Independent claim 7, as amended, recites statutory subject matter under § 101. Specifically, amended claim 7 now recites a computer-readable storage medium that stores a set of instructions that when executed by a processor . . . .” The recited “storage medium” and “processor” are structurally interrelated elements and, thus, statutory subject matter. As M.P.E.P § 2106.01 explains, “[w]hen functional descriptive material is recorded on some computer-readable medium, it becomes structurally and functionally interrelated to the medium and will be statutory in most cases since use of technology permits the function of the descriptive material to be realized.” (citing *In re Warmerdam*, 33 F.3d 1354, 1360-61, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994) (holding that a claim to a computer having a specific data structure stored in memory is statutory under 35 U.S.C. § 101).) As a result, at least the above-noted recitations make amended claim 7 and its pending dependents, claims 11-15, statutory. Accordingly, Applicants respectfully request that the Examiner withdraw the 35 U.S.C. § 101 rejection.

**C. Claim Rejections Under 35 U.S.C. § 103(a)**

Applicants respectfully traverse the rejection of claims 1-20 under 35 U.S.C. § 103(a). To establish a *prima facie* case of obviousness, the prior art reference must teach or suggest all the claim limitations. See M.P.E.P. § 2142, 8th Ed., Rev. 5 (August 2006). Moreover, "in formulating a rejection under 35 U.S.C. § 103(a) based upon a combination of prior art elements, it remains necessary to identify the reason why a person of ordinary skill in the art would have combined the prior art elements in the manner claimed." USPTO Memorandum from Margaret A. Focarino, Deputy Commissioner for Patent Operations, May 3, 2007, page 2.

A *prima facie* case of obviousness has not been established at least because none of *Kawata*, *Choquier*, *Boyd*, nor *Hayaashi*, nor their combination, teaches or suggests every feature of Applicants' amended claims. Amended independent claim 1 recites, among other things, the following:

- establishing a threshold standard time and a threshold maximum time;

- adapting the threshold standard time and the threshold maximum time so they are longer if the service is a background service and shorter if the service is a customer-critical service;

- comparing the observed processing time to the threshold standard time and the threshold maximum time;

- rerouting the first inquiry to the second computer if the processing time exceeds the threshold maximum time; and

- rerouting a second inquiry from the first computer to the second computer if the processing time exceeds the threshold standard time.

The references cited by the Examiner fail to teach or suggest several of these recitations. In particular, the references fail to teach "establishing a threshold standard

time and a threshold maximum time” and “comparing the observed processing time to the threshold standard time and the threshold maximum time.”

*Kawata*, the primary reference relied on by the Examiner, discloses routing server requests by making reference to a weighted indicator, of which a “response time” merely represents one among several factors. See e.g., par. 0009, 0040, 0067, and 0098 (providing the weighted formula for calculating load evaluation values). Thus, while *Kawata* describes rerouting when “the load evaluation value of the selected server is at or great than a certain threshold value . . . ,” it does not disclose “comparing” a “threshold standard time” or “threshold maximum time,” as claimed, because the value being compared in *Kawata* is a multi-factor load evaluation.

Moreover, even assuming for the sake of argument that *Kawata*’s load evaluation value could equate to a threshold time value, *Kawata* would still only disclose comparing a single threshold time, and not two, i.e., a (1) “threshold maximum time,” which determines whether to “rerout[e] the first inquiry to the second computer” and a (2) “threshold standard time,” which determines whether to “rerout[e] a second inquiry to the second computer,” as recited by amended claim 1.

Furthermore, at least for the reason that *Kawata* does not reroute inquiries by establishing and comparing even a single threshold time value, much less the recited “threshold standard time” and “threshold maximum time” to an observed processing time, it also does not disclose any of the remaining recitations that concern those recited threshold times. For example, *Kawata* also does not disclose “adapting the threshold standard time and the threshold maximum time so they are longer if the service is a background service and shorter if the service is a customer-critical service.”

In addition, for at least the same reasons, none of *Boyd*, *Hayashi*, *Choquier*, nor their combination, cures the deficiencies noted with respect to *Kawata*.

For at least these reasons, the art of record does not render claim 1 obvious under § 103. Further, claims 7 and 8, though different in scope from claim 1, contain recitations similar to those discussed above for claim 1 and are patentably distinguishable over the cited art for the same reasons. Finally, because dependent claims 2-6, and 9-20 necessarily include the recitations of their respective independent claims, none of the cited art renders obvious any of the dependent claims. Accordingly, Applicants respectfully request that the Examiner withdraw the rejections under 35 U.S.C. § 103(a) against pending claims 1-20 and reconsider such claims.

#### **D. Interview Summary**

Applicants greatly appreciate Examiner Matthew Lindsey's participation in the telephonic interview with the Applicants' representative on January 22, 2008. Pursuant to MPEP § 713.04, Applicants' representative provides the following substance of the interview.

In the interview, Applicants' representative explained the Applicants' position that *Kawata* does not disclose several features recited in independent claim 1, the substance of which is reflected in the Remarks above. In response, Examiner Lindsey explained the Office's interpretation of *Kawata*, particularly the portions of the reference cited the November 13, 2008 Office Action. Finally, Applicants' representative and the Examiner discussed possible amendments to advance prosecution, including those presently incorporated into amended claims 1, 7, and 8 and described in the Remarks section.

Should the Office disagree with Applicants' presentation of the substance of the interview, or if Applicants have misunderstood any of the Examiner's statements, Applicants respectfully request that the Office contact the undersigned representative immediately to discuss an appropriate resolution. Applicants recognize that the Office has not, as of the filing of this response, provided an Interview Summary. Therefore, Applicants reserve the right to provide further comments or clarifications should an Interview Summary be entered.

### **CONCLUSION**

The preceding remarks are based only on the assertions included in the Office Action, and therefore do not address patentable aspects of the invention that were not addressed by the Examiner in the Office Action. The claims may include other subject matter that is not shown, taught, or suggested by the cited art. Accordingly, the preceding remarks in favor of patentability are advanced without prejudice to other possible bases of patentability.

In view of the foregoing amendments and remarks, Applicants respectfully request reconsideration and reexamination of this application and timely allowance of the pending claims, 1-20.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Dated: February 2, 2009

/s/ Brannon McKay

By: \_\_\_\_\_

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